A

RHB BANK BHD

v.

AB MALIK ABDULLAH & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
T SELVENTHIRANATHAN J
[ORIGINATING SUMMONS NO: S5-24-1691-2007]
24 DECEMBER 2009

C ***CIVIL PROCEDURE:*** *Discovery - Discovery and inspection of documents - Principles governing pre-action discovery - Whether in breach of contract - Discovery may be allowed against directors of company where contracting party is company*

D ***CIVIL PROCEDURE:*** *Discovery - Privilege against self incrimination - Whether privilege against self-incrimination exists in Malaysia - Allegation of fraud - Whether claim of privilege must be substantiated and particularized - Whether defendants had waived privilege against self-incrimination by denying fraud in their submissions*

E On 28 January 2001, the third defendant sold certain properties located at Prangin Mall, Komtar Penang ("the properties") for RM47 million to KTB Car Park Sdn Bhd ("KTB"). The first and second defendants were the directors of KTB. The purchase of the properties was part-financed by a term loan of RM25 million granted
F by the plaintiff as evidenced by a facility agreement ("the facility agreement"). It was a condition precedent under the facility agreement that the availability of the term loan was subject to full payment of the balance purchase price of RM22 million ("the differential sum") by KTB to the third defendant. By a letter dated
G 22 March 2001, the third defendant represented to the plaintiff that the differential sum had been fully settled by KTB. KTB's solicitors also represented to the plaintiff that the conditions precedent of the facility agreement had been fully complied with. KTB subsequently defaulted in the repayment of the term loan. Receivers and
H managers were appointed for KTB. By various letters, the receiver and manager and the plaintiff's solicitors requested from all three defendants information and documents showing the purported payment of the differential sum. The defendants failed to respond to these letters. By an originating summons, the plaintiff applied for
I pre-action discovery of documents and information which were in the possession of the defendants relating to the sale and purchase of the properties. The basis of the application was that the information and

documents sought to be furnished through discovery were essential and vital to the plaintiff to pursue legal action against wrongdoers in respect of the sale of the properties. The defendants claimed that the first and second defendants in their capacity as directors of KTB were not the persons engaged in the facility agreement per se in that KTB was the contracting party. Therefore, any order sought by the plaintiff ought to be against KTB and not the first and second defendants. It was further argued that based on the plaintiff's submission, the allegation of fraud was on KTB in which the first and second defendants were directors and that they had had a part to play in the purported fraud. Therefore it was submitted that the first and second defendants ought to be allowed to rely on the privilege against self-incrimination.

Held (allowing the application):

(1) The plaintiff had satisfied the necessary requirements in relation to the principles governing pre-action discovery, which are: (i) whether the plaintiff has a *bona fide* cause of action against persons known or unknown; (ii) whether the plaintiff requires information and documents which are in the possession, custody or control of the defendants; and (iii) whether the information and documents sought are necessary for the plaintiff to properly institute proceedings against persons known or unknown. (para 25)

(2) The argument that the facility agreement was entered into by the plaintiff and KTB and not by the first and second defendants was not sustainable as the first and second defendants were the controlling mind and will of KTB at the material time and they should have had knowledge on the purported payment of the differential sum. (para 30)

(3) If the differential sum had in fact been paid, there would have been no difficulty for the defendants to furnish information of the payment, namely, the date and mode of payment as the plaintiff's contention was that there was no evidence of payment of the differential sum. (para 31)

(4) The decisions in *PMK Rajah v. Worldwide Commodities Sdn Bhd and others* and *Arjunan and Others v. Kesatuan Kebangsaan Pekerja-pekerja Ladang and Others* are not binding as the

privilege against self-incrimination no longer exists in Malaysia. The privilege against self-incrimination as applied in *Rank Film Distributors Ltd and Others v. Video Information Centre and others* has no application in Malaysia. (paras 34, 35 & 40)

(5) In any event, the claim of the privilege is not an automatic protective measure. For the defendants to successfully rely upon the privilege, they must substantiate and particularize their claim to privilege. The first and second defendants failed to particularise and substantiate their claim to privilege in their affidavit. Alternatively, the defendants must be deemed to have waived the privilege against self-incrimination as the first and second defendants in their written submissions stated that no fraud was perpetrated against the plaintiff by any of the three defendants. (paras 41, 44 & 46)

Case(s) referred to:

Arjunan Ramasamy & Ors v. Kesatuan Kebangsaan Pekerja-pekerja Ladang & Ors [1993] 1 CLJ 481 HC ***(refd)***

First Malaysia Finance Bhd v. Dato' Mohd Fathi Ahmad [1993] 3 CLJ 329 SC ***(refd)***

Guccio Gucci SpA v. Sukhdev Singh And Other Actions [1992] 1 SLR 553 ***(refd)***

Norwich Pharmacal Co And Others v. Commissioners of Customs and Excise [1973] 2 All ER 943 ***(refd)***

P v. T Ltd [1999] 1 WLR 1309 ***(refd)***

PMK Rajah v. Worldwide Commodities Sdn Bhd & Ors [1984] 1 LNS 108 HC ***(refd)***

Rank Film Distributors Ltd And Others v. Video Information Centre And Others [1981] 2 All ER 76 ***(refd)***

Rank Film Distributors Ltd And Others v. Video Information Centre And Others [1980] 2 All ER 273 ***(refd)***

Television Broadcasts Ltd & Ors v. Mandarin Video Holdings Sdn Bhd [1983] 1 LNS 32 HC ***(refd)***

The Attorney General of Hong Kong v. Zauyah Wan Chik & Ors & Another Appeal [1995] 3 CLJ 35 CA ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 132(1)

For the plaintiff - Mong Chung Seng (Wong Weng Yew with him); M/s Lee Hishammuddin Allen & Gledhill

For the 1st & 2nd defendants (m.o.b 3rd defendant) - WL Cheah; M/s Mureli Navaratnam

Reported by Amutha Suppayah

JUDGMENT

T Selventhiranathan J:

The Application

[1] By an originating summons in encl. (1), the plaintiff applied for pre-action discovery of documents and information which are in the possession of the defendants. The documents and information sought relate to the sale and purchase of certain properties located at Prangin Mall, Komtar Penang ("the properties") for RM47 million by the third defendant to a company called KTB Car Park Sdn Bhd ("KTB") respectively. The basis of the application is that the information and documents sought to be furnished through discovery are essential and vital to the plaintiff to pursue legal action against wrongdoers in respect of the sale of the properties.

The Factual Background

[2] The undisputed facts are that on 28 January 2001, the third defendant sold the properties to KTB for RM47 million. The purchase of the properties was part-financed by a term loan of RM 25 million granted by Bank Utama (M) Berhad ("BUMB"), as evidenced by a facility agreement dated 22 March 2001 ("the facility agreement"). The assets and liabilities of BUMB became vested in the plaintiff pursuant to a vesting order dated 8 April 2003. References to the plaintiff in this judgment shall mean BUMB prior to 8 April 2003.

[3] It was a condition precedent under the facility agreement that the availability of the term loan was subject to full payment of the balance purchase price of RM22 million ("the differential sum") by KTB to the third defendant. By a letter dated 22 March 2001, the third defendant represented to the plaintiff that the differential sum had been fully settled by KTB. By a letter dated 24 March 2001, KTB's solicitors also represented to the plaintiff that the conditions precedent of the facility agreement had been fully complied with.

[4] Arising from KTB's default in the repayment of the term loan, the plaintiff appointed Encik Mustapha Mohamed and Mr Jeyaraj Ratnaswamy ("the first receiver and manager") as the receiver and manager of KTB pursuant to the terms of a debenture dated 22 March 2001 ("the debenture"). On 14 August 2006, the first receiver and manager was replaced by Encik Anwar bin Yahya as receiver and manager ("the second receiver and manager"). By

various letters, the second receiver and manager and the plaintiff's solicitors requested from all three defendants information and documents showing the purported payment of the differential sum. The defendants failed to respond to these letters.

The Plaintiff's Case

[5] It was submitted that the plaintiff's application in encl. (1) was necessary as:

(a) apart from the confirmation given by the third defendant and KTB's solicitors at the material time, there was no evidence to show that the differential sum had been paid;

(b) if the differential sum had not been paid prior to the release of the term loan, it may give rise to an action of fraud, conspiracy to defraud the plaintiff or breach of the facility agreement against those involved.

[6] The reliefs in encl. (1) were therefore necessarily sought against all the defendants for the following reasons:

(a) the first and second defendants were the only directors and shareholders of KTB at the material time and, in the circumstances, they are in a position to be able to furnish information and documents of the purported payment of the differential sum;

(b) the third defendant, which was the vendor in the sale of the properties, is also in a position to be able to furnish information and documents of the purported payment of the differential sum.

[7] Accordingly, if the defendants are compelled by this court to furnish the information and documents sought by the plaintiff, the plaintiff would be able to determine the proper cause of action to institute proceedings, and the proper defendants to be brought in, in the proposed action.

[8] It was further submitted that the defendants have not shown any prejudice that may be caused to them by the reliefs sought by the plaintiff in encl. (1), and that the requirements in granting pre-action discovery had been satisfied in that:

(a) the plaintiff had a *bona fide* cause of action against persons known or unknown for fraud, conspiracy to defraud the plaintiff or breach of the facility agreement;

(b) the information and/or documents in regard to the purported payment of the differential sum required by the plaintiff are in the possession, custody or control of the defendants;

(c) the information and documents on the purported payment of the differential sum are necessary for the plaintiff to properly frame its action.

The Defendants' Response

[9] No submissions were put in on behalf of the third defendant. However, it was submitted on behalf of the first and second defendants that it was pertinent to note that prior to the granting of the facility agreement, the plaintiff commissioned a valuation of the properties for the purposes of the banking facility to finance their purchase. In the valuation report, the valuers had opined that the properties had a market value of RM47 million and a forced-sale value of RM37.6 million.

[10] The transaction was then duly completed pursuant to the terms and conditions of the facility agreement when, amongst others, the full purchase price was paid to the vendor, the third defendant herein. This was confirmed by the third defendant to the plaintiff as well as by the solicitors acting for KTB.

[11] Pursuant to the terms and conditions of the facility agreement, the plaintiff created a debenture over KTB and had then exercised the powers of the debenture granted under the facility agreement to appoint a receiver and manager over KTB.

[12] In other words, according to learned counsel, the plaintiff had acknowledged that the facility agreement was proper and it was exercising rights and powers conferred under the agreement. The plaintiff had also attempted to exercise further powers by entering into a purported sale of the properties to other third parties, and it was not until an injunction was granted by the High Court in Malaya at Penang restraining the sale of the properties for a sum not less than RM33 million (as the plaintiff had attempted to sell the properties for a mere RM15 million) that the application herein was filed.

[13] It was submitted that the plaintiff was seeking an order against the first and second defendants in their capacity as directors of KTB. However, they were not the persons engaged in the facility agreement *per se* in that KTB was the contracting party. Therefore, any order sought by the plaintiff (if it is so entitled) ought to be against KTB and not the first and second defendants.

[14] The attempt to lift the corporate veil by the plaintiff against the first and second defendants was without merit as the plaintiff was alleging that there may be a *prima facie* cause of action of, *inter alia*, breach of contract, fraud and conspiracy to injure the plaintiff, which was denied. In the circumstances the proper party against which discovery was to be ordered (which in their submissions ought not to be) would be KTB and not the first and second defendants. The purported allegation of fraud had not even been established by the plaintiff and the plaintiff must not be allowed to make bare averments of fraud to lift the corporate veil and to subsequently obtain an order for discovery against the relevant defendants.

[15] It was further submitted that, by the plaintiff's own affidavit, there was sufficient evidence to show that the differential sum had been paid by KTB. This was clear from the acknowledgment which had been given by the third defendant to the plaintiff.

[16] It was stipulated in that letter that if the deeds of assignment of the properties could not be effected in favour of KTB, then the third defendant would reimburse the plaintiff the sum of RM25 million being the loan given under the facility. Further, the third defendant had acknowledged receiving payment of RM22 million being the balance purchase price of the properties.

[17] It was therefore contended that the allegation that the differential sum of RM22 million had not been paid to the third defendant was completely unfounded, coupled with the fact that the solicitors acting in the transaction had also confirmed that all the conditions and approvals required for the completion of the sale, which included the payment of the differential sum, had been met. In the circumstances, no suggestion or hint of purported fraud existed and the plaintiff's application was an abuse of process and without any merit.

[18] The mere conduct of the plaintiff in exercising its rights over the properties signified that the plaintiff was aware of and had acknowledged the propriety of the entire transaction and it was now too late for the plaintiff to make the application in encl. (1). Also, the motives of the plaintiff in making the application after the granting of the injunction by the High Court at Penang restraining what was alleged to be an undervalued sale by the plaintiff itself were questionable. Therefore, the plaintiff was precluded from alleging that the entire transaction was tainted by fraud.

[19] It was further argued that, based on the submissions of the plaintiff, it appeared that the allegation of fraud was on KTB in which the first and second defendants were directors and that they had had a part to play in the purported fraud. In these circumstances, the nature of the information and documents sought would be self-incriminating *vis-a-vis* the first and second defendants, and therefore the same would be privileged, relying on the cases of *Rank Film Distributors Ltd And Others v. Video Information Centre And Others* [1981] 2 All ER 76 [House of Lords], *PMK Rajah v. Worldwide Commodities Sdn Bhd & Ors* [1984] 1 LNS 108 and *Arjunan Ramasamy & Ors v. Kesatuan Kebangsaan Pekerja-pekerja Ladang & Ors* [1993] 1 CLJ 481.

[20] It was therefore submitted that the first and second defendants ought to be allowed to rely on the privilege against self-incrimination notwithstanding the fact that the differential sum had been paid as admitted by the solicitors for KTB themselves.

[21] In relation to the documents in the possession, custody or control of the first and second defendants, it was submitted that the first and second defendants had expressly averred that the matters in relation to the accounts of KTB had been handed over to its receiver and manager appointed by the plaintiff and this was not denied. In other words, all the accounting records and documents (including those which have been relied on by the plaintiff) indicated that the differential sum had been paid. This was also confirmed by the third defendant itself and accordingly there was no purpose to be served in this application made by the plaintiff.

[22] It was further contended that the entire proceedings herein was an attempt to circumvent the injunction granted restraining the undervalued sale of the properties and that the plaintiff must not be

allowed in its attempt to discharge the injunction "through the back door on an unwarranted allegation of fraud in securing the banking facility".

[23] In conclusion, the first and second defendants submitted that there was no merit whatsoever in the plaintiff's application against them and that the proper defendant in this case should be KTB which had all the relevant records sought through this application. Further, by virtue of these proceedings being brought against the first and second defendants as directors of KTB, the plaintiff was indicating that there existed elements of fraud in securing the banking facility and the first and second defendants ought to be accorded the privilege against self-incrimination. Finally, the plaintiff, through the receiver and manager, was in possession of all the records and documents of KTB and there was no necessity for the application herein.

[24] The first and second defendants therefore prayed that the application herein be dismissed with costs.

Findings By The Court

[25] Having considered the submissions made on behalf of the parties, I made an order in terms of the plaintiff's application in encl. (1) as I was of the view that the plaintiff had satisfied the necessary requirements in relation to the principles governing pre-action discovery. In this regard, I had to consider the following factors:

(a) whether the plaintiff has a *bona fide* cause of action against persons known or unknown;

(b) whether the plaintiff requires information and documents which are in the possession, custody or control of the defendants;

(c) whether the information and documents sought are necessary for the plaintiff to properly institute proceedings against persons known or unknown.

[26] The starting point of the law on modern pre-action discovery is the case of *Norwich Pharmacal Co And Others v. Commissioners of Customs and Excise* [1973] 2 All ER 943, where the House of Lords held that an action for pre-action discovery can be maintained and granted against potential defendants where the person against whom

discovery of information is sought had himself, even though innocently, been involved in the wrongful acts of another so as to facilitate the wrongdoing.

[27] The principles in *Norwich Pharmacal (supra)* were expressly incorporated into Malaysian jurisprudence by the then Supreme Court in the case of *First Malaysia Finance Bhd v. Dato' Mohd Fathi Hj Ahmad* [1993] 3 CLJ 329, where Edgar Joseph Jr SCJ went through the development of the law regarding pre-action discovery and at pp. 335-336 of the judgment held:

> Suffice it to say that the process of discovery was hardly known to the common law; it was the invention of equity. Indeed, the overriding purpose of the Bill in Chancery was, as it was said 'to scrape the conscience of the defendant'.
>
> ...
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> In our view, there can be no doubt that Norwich Pharmacal is in effect a consolidation of the early authorities on discoveries, which the House had approved. ... We would respectfully follow the principles enunciated by the House of Lords in *Norwich Pharmacal* ...

[28] The principles which were laid down in *Norwich Pharmacal (supra)* have since been developed extensively by the courts in various jurisdictions including in England itself. In *P v. T Ltd* [1999] 1 WLR 1309, the plaintiff sought an order for his former employer to disclose precise details of allegations made against him by way of documents and information to enable the plaintiff to commence an action against the wrongdoer. The headnote of the case, which stipulates its *ratio decidendi* as elicited from the judgment, reads:

> Where justice cannot otherwise be done, a plaintiff is entitled to discovery against a defendant in order to obtain information for use in bringing proceedings against a third party, even though it cannot be ascertained, without the information sought, that the third party has committed a tort against the plaintiff.

In his judgment, Sir Richard Scott VC at pp. 1318 to 1319 of the report of that case went on to hold:

> In that respect his position is not the same as that of the plaintiff in the *Norwich Pharmacal* case [1974] AC 133. In the *Norwich Pharmacal* case the plaintiff was able to demonstrate that tortious

> infringements of patent rights were being committed. It did not know by whom. It did not know whom to sue. But that there was tortious conduct against it was not in question. In the present case it is in question whether a tort has been committed against the plaintiff. He believes that it has. The purpose of any order I make, as I suppose of any order that a judge ever makes, is to try to enable justice to be done. ...
>
> ...
>
> ... For my part, I see no reason whatever why the *Norwich Pharmacal* principle should be regarded as inapplicable to assist a prospective plaintiff to obtain information and documents necessary for the bringing of an action of libel or malicious falsehood in circumstances such as exist in the present case. I am of the opinion that this is a case in which justice does require the granting of the relief sought by the notice of motion.

[29] Having the above principles in mind, I addressed the arguments advanced on behalf of the plaintiff and the first and second defendants. I found the contention of the latter that the plaintiff had accepted the valuation report of the properties dated 3 December 2000 and had acted on it to be irrelevant as what is in issue is whether the differential sum was paid.

[30] The argument that the facility agreement was entered into by the plaintiff and KTB and not by the first and second defendants is not sustainable as the first and second defendants were the controlling mind and will of KTB at the material time and they should have had knowledge on the purported payment of the differential sum.

[31] In respect of the contention that there had already been confirmation of the payment of the differential sum in KTB's solicitors' letter of 24 March 2001 and the third defendant's letter of 22 March 2001, I agreed with the submissions of the plaintiff that if the differential sum had in fact been paid, there would be no difficulty for the defendants to furnish information of the payment, namely, the date and mode of payment as the plaintiff's contention for the application in encl. (1) is that there is no evidence of payment of the differential sum.

[32] As to the argument that the plaintiff had exercised its rights under the facility agreement and debenture and therefore had accepted that everything was in order, again this argument cannot

hold water as the exercise of the plaintiff's rights thereunder had nothing to do with the issue of whether the differential sum had been paid.

[33] The defendants' contention that the principles laid down in *Norwich Pharmacal (supra)* were not applicable, as that case could be distinguished from the present case, cannot stand in the light of the decision there that pre-action discovery also applied to the discovery of information and documents. As stated earlier, the principles of law on pre-action discovery laid down in *Norwich Pharmacal (supra)* were adopted and incorporated into the jurisprudence of Malaysia by the then Supreme Court in *First Malaysia Finance Bhd (supra)*.

[34] The defendants purported to also rely on the privilege against self-incrimination to attempt to defeat the application in encl. (1). They cited the decisions in *PMK Rajah (supra)* and *Arjunan And Others (supra)* in support of their contention that the privilege against self-incrimination as applied in *Rank Film Distributors Ltd And Others (House of Lords) (supra)* should defeat the plaintiff's application for discovery.

[35] However, the above cases are not binding on this court as the privilege against self-incrimination no longer exists in Malaysia. On the contrary, I am bound by the decision in *The Attorney General of Hong Kong v. Zauyah Wan Chik & Others & Another Appeal* [1995] 3 CLJ 35; [1995] 2 MLJ 620, wherein the Court of Appeal held that the common law privilege against self-incrimination has been removed by virtue of s. 132(1) of the Evidence Act 1950. Although the facts in that case did not involve an application such as in the present case, in coming to the above conclusion, Gopal Sri Ram JCA (now FCJ) at p. 631 of the judgment cited with approval the decision of NH Chan J (later JCA) in *Television Broadcasts Ltd & Ors v. Mandarin Video Holdings Sdn Bhd* [1983] 1 LNS 32 when he opined as follows:

> In *Television Broadcasts Ltd and others v. Mandarin Video Holdings Sdn Bhd* [1983] 2 MLJ 346, my learned brother NH Chan J (as he then was) reviewed several authorities and, in my respectful opinion, rightly held that the effect of the section is to do away with the privilege against self-incrimination that is part of English common law. Suzanne McNicoll in her treatise on the *Law of Privilege* (1992 Ed), provides the following comprehensive statement of the rule, attributing it to the formulation of it by Lord Goddard in *Blunt v. Park Lane Hotels Ltd* [1942] 2 KB 253:

> It is a fundamental principle of the common law that, in civil and criminal cases, a person is not obliged to answer any question or produce any document if the answer or the document would have a tendency to expose that person, either directly or indirectly, to a criminal conviction, the imposition of a penalty or the forfeiture of an estate.

As observed, s. 132 has excluded the operation of this doctrine in our jurisprudence.

[36] NH Chan JCA was also part of the coram in *Attorney General of Hong Kong (supra)*. I now revert to what NH Chan J had to say at p. 353 of *Television Broadcasts Ltd And Others (supra)*:

> Now, the question is, does the *Rank* case apply.

[37] He then proceeded to review the law on the privilege against self-incrimination in other jurisdictions and concluded at p. 355 of the judgment:

> That is the present state of the law in England. In this country, the privilege is withdrawn by section 132 of the Evidence Act 1950. ...

[38] Although s. 132 of the Evidence Act 1950 uses the word "witness", NH Chan J in *Television Broadcasts Ltd And Others (supra)* went on to hold at p. 357 of the judgment:

> Mr Wong has also urged on behalf of the defendants that the word 'witness' in section 132 does not apply to a party - a party is not a witness. With respect, that cannot be right. Although a witness may not be a party to proceedings, the converse is not true. A party to proceedings or for that matter, even an accused person, can be a witness if he gives evidence. ...

[39] He went on to say at p. 357 of the judgment as follows:

> In my judgment, a witness is a person who gives or 'furnishes' evidence. If a person gives or is compelled by a court order (as in this case) to give evidence then he is a witness. It does not matter if he is a party or any other person. ...

[40] Therefore, based on the foregoing, I am of the view that the privilege against self-incrimination as applied in the *Rank* case *(supra)* has no application in Malaysia.

[41] In the event an appellate court does not agree with me and finds that the privilege against self-incrimination does apply, it must be emphasised that the claim of the privilege is not an automatic protective measure. For the defendants to successfully rely upon the privilege, they must substantiate and particularize their claim to privilege.

[42] In *Guccio Gucci SpA v. Sukhdev Singh And Other Actions* [1992] 1 SLR 553, Chan Sek Keong J (now Chief Justice of Singapore) sitting then in the High Court of Singapore held that a defendant must substantiate its claim of privilege by showing a real and appreciable risk that the defendant will face criminal prosecution if the disclosure is made. The court went on to hold that:

> (2) Where the privilege is claimed and there is a basis for claiming it, the judge must consider whether it is a *bona fide* claim. *The mere assertion by a party that he may or will incriminate himself is not sufficient*. Where there is a basis for claiming the privilege, it is the paramount duty of the court to uphold it.
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> [Emphasis added].

[43] With respect, I would adopt that enunciation as the correct statement of the law.

[44] On the facts of the present case, the third defendant did not file any affidavit in opposition to the plaintiff's application. The first and second defendants in the first defendant's common affidavit did not raise any claim of privilege. The issue of privilege was only raised in the first and second defendants' written submissions. This is insufficient as it cannot constitute evidence and consequentially there can be no basis for their claiming any privilege against self-incrimination.

[45] Therefore, the defendants are precluded from relying on the privilege against self-incrimination in the present case as the first and second defendants failed to particularise and substantiate their claim to privilege in their common affidavit and the third defendant did not file any affidavit at all to challenge the plaintiff's evidence upon affidavit.

[46] Alternatively, the defendants must be deemed to have waived the privilege against self-incrimination as the first and second defendants in their written submissions stated that no fraud was perpetrated against the plaintiff by any of the three defendants.

[47] As denial is the plausible defence which the defendants have chosen to raise against any proposed claim in fraud and conspiracy which the plaintiff may bring against them, then, by the very fact that they have denied the existence of the same, the defendants have chosen to waive the privilege against self-incrimination.

[48] The effect of a waiver of the privilege against self-incrimination was discussed by the Court of Appeal in *Rank Film Distributors Ltd And Others v. Video Information Centre And Others* [1980] 2 All ER 273 where Templeman LJ at p. 291 of the judgment stated:

> In every case in which the defendant is faced with possible self-incrimination as a result of discovery or interrogatories and especially where the tort and the crime are constituted by the same activity, the defendant has a choice. The defendant may choose to rely on the silence and concealment afforded by the doctrine against self-incrimination in order at one and the same time to hamper the plaintiff in the proof of his civil action and as a means of resisting or avoiding criminal prosecution or conviction. ... Alternatively again, if a defendant wishes to maintain a plausible defence to the civil suit, he will waive the privilege and give frank answers to interrogatories and full discovery.

[49] On the facts, the defendants denied fraud or conspiracy. This would be a defence to the cause of action the plaintiff may have. The defendants therefore waived their rights to rely on the privilege against self-incrimination in the circumstances.

[50] In making the orders sought, I took into account the fact that the documents concerning the purported sale of the properties are not in the possession, custody or control of the plaintiff. The sale of the properties is alleged to have taken place in the year 2001. By reference to exh. "D2" of the first and second defendants' common affidavit, it was noted that KTB's receiver and manager only took possession of KTB's documents from 2003. The documents from 2001 were never handed to KTB's receiver and manager. Therefore, as the first and second defendants were the directors of KTB in 2001, it may be safely concluded that either the documents must be in their possession, custody or control or that they must have access to them. Further, there is no reason why the third defendant would want to deny custody, possession or control over the documents asked for by the plaintiff.

[51] Finally, the contention that the accounting records and documents of KTB are in the possession of the receiver and manager of KTB must fall in light of the fact that the documents of KTB prior to 2003 were never handed to the first receiver and manager. It is therefore obvious that the second receiver and manager does not have the documents on the purported payment of the differential sum in 2001. As regards the third defendant, it would still have the documents in regard to the purported payment.

[52] Therefore, dictated by settled principles, the application in encl. (1) was allowed and I made an order in terms thereof accordingly.

[53] This case was heard and disposed of by me while sitting as a judge of the High Court in Malaya at Kuala Lumpur.